MALAYAN BANKING BHD

v.

CHING SUIT FEE

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
MOHD GHAZALI YUSOFF FCJ
HASAN LAH FCJ
[CIVIL APPEAL NO: 02(f)-2-2011 (W)]
11 JANUARY 2012

BANKING: *Banks and banking business - Letter of credit - Presentation of an irrevocable letter of credit - Whether mandatory requirement for payment to be effected upon sight of document by issuing bank - Whether contract pursuant to letter of credit fully realised - Whether issuing bank had no right to seek return of monies*

BANKING: *Banks and banking business - Letter of credit - Right of recourse - Whether negotiating bank had right of recourse against beneficiary of letter of credit - Uniform Customs and Practice for Documentary Credit International Chamber of Commerce - Whether negotiating banks obliged to return monies paid - Whether there was equitable ground to hold money paid by mistake - Whether respondent entitled to payment - Whether appellant estopped from seeking refund - Whether negotiating bank entitled to deduct it's customer's account for purpose of returning monies equivalent to issuing bank's demand - Contracts Act 1950, s. 73*

CIVIL PROCEDURE: *Estoppel - Banks and banking business - Letter of credit - Demand of refund on grounds of alleged irregularities in documents after endorsing payment to respondent - Whether estoppel applied*

The respondent in this case received a Letter of Credit ('LC') for the sum of RM194,800 from the issuing bank, Taipei Business Bank ('TBB') in respect of purchase of goods by a company in Taipei. The appellant, the negotiating bank, assisted the respondent in the LC's transaction. The appellant confirmed to the reimbursing bank, Hong Kong and Shanghai Banking Corporation ('HSBC') that the terms and conditions of the said letter of credit had been complied with, hence the appellant claimed the said payment from the issuing bank and credited the

A respondent's account with the said sum. However, the appellant was then informed by TBB that there were discrepancies in the documents forwarded to them by the appellant. The appellant demanded from the respondent for the refund of the said sum but the respondent refuted the appellant's demands. Despite the
B respondent's objection, the appellant unilaterally proceeded to debit the respondent's account and refunded to HSBC the said sum. The respondent sued the appellant claiming that the appellant had wrongly deducted the customer's account of the respondent for the purpose of returning monies equivalent to the
C issuing bank's demand. The High Court allowed the respondent's claim against the appellant, and the Court of Appeal affirmed the said decision. The appellant thus appealed. Leave to appeal was granted by this court on the following questions: (i) whether under the Uniform Customs and Practice for Documentary Credit
D International Chamber of Commerce (UCP 400) and international banking procedure, a negotiating bank had a right of recourse against a beneficiary of a letter of credit; (ii) whether the negotiating bank was obliged to return the monies paid by the issuing bank upon the return of the documents to the beneficiary;
E and (iii) whether under s. 73 of the Contracts Act 1950, the negotiating bank was entitled to deduct it's customer's account for the purpose of returning monies equivalent to the issuing bank's demand.

F **Held (dismissing the appeal with costs)**
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Based on the provision of art. 10(a)(iv) of the UCP 400,
G upon the presentation of an irrevocable letter of credit to the issuing bank (TBB), it is a mandatory requirement that payment is to be effected upon sight of the said document by the issuing bank. The contract pursuant to the said letter of credit is considered by then to have been fully realised. The
H issuing bank had no right to seek the return of the monies it had paid to the appellant as payment was upon sight of the documents. The issuing bank was estopped from seeking the return of the monies that it had lawfully remitted to the respondent through the appellant as the negotiating bank. The
I right of recourse did not arise in the present case because TBB as the issuing bank did honour the letter of credit at the

first instance. Further, the issuing bank is estopped from demanding the return of the payment made on the grounds of alleged defects or discrepancies. There must be certainty, promptness and finality of payment which a letter of credit served to provide to the transacting parties. The court would also not lightly interfere with the bank's obligations to make payments under a letter of credit. (paras 8, 9 & 11)

(2) A letter of indemnity was relied upon by the appellant to support the argument that the transaction was carried out under the UCP 400 which provides for a right of recourse. However, the argument made by the appellant was unnecessary for if there was an indemnity, the appellant's recourse to the respondent was upon the indemnity and not the UCP 400. Further, the indemnity herein was suspect as to its authenticity and applicability to the said letter of credit's transaction. The High Court had accepted the evidence of the respondent and held that the letter of indemnity was suspicious because the date had been blanked over and it was executed for other purposes. That was a finding of fact made by the trial judge and this court as an appellate court should not disturb such a finding. (para 14)

(3) There was no payment by mistake to the respondent because the payment made was in fact due to the respondent under the letter of credit. There was no equitable ground to hold that the money had been paid by mistake. There was also no fraud on the part of the respondent during her receipt of the payment. The appellant had in fact represented to the respondent that the respondent was entitled to the payment. By doing so, the appellant was estopped from seeking a refund. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Responden di dalam kes ini telah menerima Surat Kredit ('SK') bagi amaun RM194,800 dari bank pengeluar, Taipei Business Bank ('TBB') berkenaan dengan pembelian barangan oleh sebuah syarikat di Taipei. Perayu, bank perunding, membantu responden di dalam transaksi SK. Perayu mengesahkan kepada bank pembayar, Hong Kong and Shanghai Banking Corporation ('HSBC') bahawa terma-terma dan syarat surat kredit tersebut telah dipatuhi, oleh itu perayu menuntut bayaran tersebut dari

bank pengeluar dan jumlah tersebut telah dikreditkan ke dalam akaun responden. Walaubagaimanapun, perayu telah diberitahu TBB bahawa terdapat beberapa percanggahan dalam dokumen yang diserah oleh perayu. Perayu menuntut bayaran balik jumlah tersebut daripada responden tetapi responden menafikan tuntutan perayu. Walaupun responden telah membantah, perayu secara unilateral terus mendebitkan akaun responden dan mengembalikan jumlah tersebut kepada HSBC. Responden mendakwa perayu telah secara salah memotong jumlah dari akaun pelanggan responden untuk tujuan mengembalikan wang bersamaan dengan permintaan bank pengeluar. Mahkamah Tinggi telah membenarkan tuntutan responden terhadap perayu, dan Mahkamah Rayuan telah mengesahkan keputusan tersebut. Oleh itu perayu merayu. Kebenaran untuk merayu telah diberi oleh mahkamah ini atas soalan-soalan berikut: (i) sama ada di bawah Uniform Customs and Practice for Documentary Credit International Chamber of Commerce (UCP 400) dan prosedur perbankan antarabangsa, bank perunding mempunyai hak untuk mengambil tindakan terhadap benefisiari surat kredit; (ii) sama ada bank perunding diwajibkan untuk mengembalikan wang yang dibayar oleh bank pengeluar apabila dokumen-dokumen dikembalikan kepada benefisiari; dan (iii) sama ada di bawah s. 73 Akta Kontrak 1950, bank perunding berhak memotong jumlah dari akaun pelanggannya untuk tujuan mengembalikan wang bersamaan dengan permintaan bank pengeluar.

Diputuskan (menolak rayuan dengan kos)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Berdasarkan peruntukan perkara 10(a)(iv) UCP 400, atas pemberian surat kredit yang tidak boleh batal kepada bank pengeluar (TBB), ia adalah keperluan mandatori bahawa bayaran harus dilaksanakan apabila bank pengeluar menerima dokumen-dokumen tersebut. Kontrak menurut surat kredit dianggap dilaksanakan. Bank pengeluar tidak mempunyai hak untuk menuntut pengembalian wang yang telah dibayar kepada perayu kerana bayaran adalah atas penerimaan dokumen-dokumen. Bank pengeluar diestop dari menuntut pengembalian wang yang telah diremitkan secara sah di sisi undang-undang kepada responden melalui perayu sebagai bank perunding. Hak untuk bertindak tidak timbul di dalam kes ini sebab TBB

sebagai bank pengeluar telah melaksanakan surat kredit awal-awal lagi. Seterusnya, bank pengeluar diestop dari menuntut pengembalian wang yang dibuat atas dasar dakwaan kecacatan atau percanggahan. Perlu ada kepastian, kesegeraan dan kemuktamadan bayaran yang ingin diberikan oleh sesuatu surat kredit kepada pihak-pihak yang melakukan transaksi. Mahkamah tidak boleh dengan sewenangnya campurtangan dengan kewajipan-kewajipan bank untuk membuat bayaran di bawah surat kredit.

(2) Perayu telah bergantung kepada satu surat tanggungrugi bagi menyokong hujahannya bahawa satu transaksi telah dilaksanakan di bawah UCP 400 yang membenarkan hak untuk bertindak. Walaubagaimanapun, hujahan perayu adalah tidak perlu kerana jika wujudnya tanggungrugi, tindakan perayu terhadap responden adalah atas dasar tanggungrugi dan bukan UCP 400. Seterusnya, tanggungrugi di sini adalah disyaki kesahihannya dan pemakaiannya ke atas transaksi surat kredit tersebut. Mahkamah telah menerima keterangan responden dan memutuskan bahawa surat tanggungrugi adalah disyak kerana tarikhnya telah dipadam alih dan ia telah dilaksanakan untuk tujuan-tujuan lain. Ia adalah satu dapatan fakta yang dibuat oleh hakim bicara dan mahkamah ini tidak patut mengganggu dapatan tersebut.

(3) Tiada bayaran salah dibuat kepada responden kerana bayaran itu adalah terhutang kepadanya di bawah surat kredit. Tiada alasan adil dan saksama untuk memutuskan bahawa wang telah salah dibayar. Juga tidak terdapat penipuan dari pihak responden semasa menerima bayaran. Perayu telah menggambarkan kepada responden bahawa responden berhak mendapat bayaran. Dengan berbuat demikian, perayu diestop daripada mendapat bayaran balik.

Case(s) referred to:

FC Seck Trading as Oversea Structural Company v. Wong And Lee [1940] 1 LNS 19 ***(refd)***

Hamzeh Malas & Sons v. British Imex Industries Ltd [1958] 1 All ER 262 ***(refd)***

Holt & Ors v. Markham [1922] All ER 134 ***(refd)***

Kelly v. Solari (1835-1842) All ER Rep 320 ***(refd)***

Shiba Prasad Singh v. Chandra Nandi [1949] LR 76 IA 244 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 73

Contract Act [India], s. 72

For the appellant - GK Ganeson (KN Geetha & SP Tan with him); M/s Abd Aziz Chen & Co
For the respondent - K Ganesan; M/s Indira Ghadi & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-719-05]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court in allowing the respondent's claim against the appellant. Leave to appeal was granted by this court on the following three questions:

(i) Whether under the Uniform Customs and Practice for Documentary Credit International Chamber of Commerce (UCP 400) and international banking procedure, a negotiating bank had a right of recourse against a beneficiary of a letter of credit?

(ii) Whether the negotiating bank is obliged to return the monies paid by the issuing bank upon the return of the documents to the beneficiary?

(iii) Whether under s. 73 of the Contracts Act 1950, the negotiating bank was entitled to deduct its customers account for the purpose of returning monies equivalent to the issuing bank's demand?

Background Facts

[2] The relevant background facts and the chronology of events leading to the present appeal are as follows:

(1) On 6 July 1993 McMillan Enterprises Co Ltd, a Taiwanese Company ("the company") instructed Taipei Business Bank ("TBB"), the issuing bank to open a letter of credit for a sum of RM194,800 in favour of the respondent in respect of purchase of goods by the company from the respondent. After receiving the letter of credit the respondent requested the appellant, the negotiating bank, to assist in the letter of credit's transaction. The respondent handed various relevant documents to the appellant for it to "negotiate" the letter of credit.

(2) On 6 July 1993, Standard Chartered Bank, the advising bank advised the appellant that the letter of credit for the benefit of the respondent had been issued by TBB for the sum of RM194,800.

(3) On 10 July 1993, the respondent submitted the draft and documents for negotiations to the appellant which included:

(i) an original letter of credit No. BAGAIMOOO937;

(ii) an original Airway Bill No. 695 0094 5103;

(iii) original signed Packing List in three copies;

(iv) two copies of signed Bill of Exchange; and

(v) two copies of signed Documentary Collecting/ Negotiation Forms.

(4) On 12 July 1993, the appellant confirmed to the Hong Kong and Shanghai Banking Corporation ("HSBC") the reimbursing bank, that the said documents were complete and the terms and conditions of the said letter of credit had been complied with and hence the appellant claimed payment of RM194,800 from the issuing bank through the said reimbursement bank.

(5) On 20 July 1993, TBB gave confirmation to HSBC to pay the appellant the sum claimed by the appellant under the letter of credit.

(6) On 22 July 1993, the appellant credited the respondent's account with the sum of RM194,605.

(7) On 24 July 1993, TBB informed the appellant that there were discrepancies in the documents forwarded to them by the appellant.

(8) On 20 August 1993 the appellant demanded from the respondent for the refund of the sum credited together with interest.

(9) On 20 August 1993 the respondent refuted the appellant's demands, *inter alia*, stated that the goods had been shipped and that all conditions of the letter of credit had been fulfilled. Any refund made shall be at the appellant's own peril.

(10) On 21 August 1993 the respondent submitted documents duly rectified as per the appellant's request and clearly stated that the appellant should withhold any refund.

(11) On 24 August 1993 despite the objection by the respondent, the appellant unilaterally proceeded to debit the respondent's account and refunded to HSBC the sum of RM196,528.

(12) On 28 August 1993 the appellant informed TBB that it was unable to refund, since TBB as the issuing bank had authorised payment and payment had in fact been received by the appellant.

(13) On 9 September 1993 the respondent sued the appellant claiming that the appellant had wrongly deducted the customer's account of the respondent for the purpose of returning monies equivalent to the issuing bank's demand.

(14) The High Court allowed the respondent's claim against the appellant. The Court of Appeal on appeal affirmed the decision of the High Court. The appellant now appeals to this court against the decision of the Court of Appeal.

Contention Of The Appellant

[3] It is the contention of the appellant that in a letter of credit's transaction, documents travel in "opposite direction" to the funds. It is based on documents which are negotiated instead of goods. Documentary requirements are of utmost priority. Discrepancies in documents would mark the end of the transaction, and time is of essence. When an issuing bank rejects

the documents due to discrepancies, the beneficiary is entitled to demand for the return of the documents and the issuing bank must receive the credit it sent to the reimbursing bank.

[4] In the present case it is also contended on behalf of the appellant that there is a clear case of mistake when the respondent as the beneficiary was paid before the confirmation of the documents. The respondent was paid through the account held with the appellant. The appellant had a duty to return monies paid by mistake and the moment the respondent requested for return of its documents, the letter of credit's transaction no longer existed. The appellant further contended the fact that the respondent made a second attempt to commence a new letter of credit's transaction for the same item showed that there was a clear variation of the transaction. The respondent therefore does not have a valid claim after resorting to an alternative mechanism.

Decision

The Law Relating To Letter Of Credit

[5] At the outset it is necessary that we examine what is a letter of credit and its legal effect when it is issued. A letter of credit or documentary credit means any arrangement, however named or described whereby a bank (the issuing bank) acting at the request and on instructions of a customer (the applicant for the credit) is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange drawn by the beneficiary, or authorises another bank to effect such payment, or to pay, accept or negotiate such bills of exchange against stipulated documents provided that the terms and conditions of the credit are complied with. (See *Law of Banking* 2nd edn, Poh Chu Chai).

[6] The law governing Letter of Credit in the present case is the Uniform Customs and Practice for Documentary Credit International Chamber of Commerce ("UCP 400"). Articles 3 and 4 of the UCP 400 provides as follows:

> (3) Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contracts(s) is included in the credit.

A (4) In credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate.

[7] It is to be noted the type of letter of credit issued in this case is an irrevocable letter of credit. As regards this irrevocable B letter of credit art. 10(a)(iv) of the UCP 400 provided that:

(a) An irrevocable credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are C complied with:

(iv) If the credit provides for negotiation – to pay without recourse to drawers and/or *bona fide* holders, draft(s) drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee stipulated D in the credit other than the issuing bank itself, or to provide for negotiation by another bank and to pay, as above, if such negotiation is not effected.

[8] Based on the provision of art. 10(a)(iv) of the UCP 400, we E are of the view that upon the presentation of an irrevocable letter of credit to the issuing bank (TBB), it is a mandatory requirement that payment is to be effected upon sight of the said document by the issuing bank. The contract pursuant to the said letter of credit is considered by then to have been fully realised.

F **Right Of Recourse**

[9] In relation to the appellant's rights of recourse it is our judgment that the issuing bank had no right to seek the return of the monies it had paid to the appellant as payment was upon G sight of the documents. The issuing bank is estopped from seeking the return of the monies that it had lawfully remitted to the respondent through the appellant as the negotiating bank.

[10] The right of recourse does not arise in the present case because TBB as the issuing bank did honour the letter of credit H at the first instance. Telegraphic transfer and the remittance of the payment RM194,605 into the respondent's account was made on 22 July 1993 upon deduction of bank commission and charges. It was only on 24 July 1993 that the TBB, citing discrepancies in the letter of credit sought a refund from the appellant. The I legitimacy of the TBB's request for a refund at that point of time

was never questioned by the appellant at all. On 24 August 1993 the appellant provided TBB with a refund. It is to be noted however, that in a letter dated 28 August 1993 the appellant had informed the TBB that it was unable to carry out TBB's instruction regarding the refund because the reimbursing bank had made the payment upon the authorisation of the issuing bank (TBB). The appellant therefore on its own had later admitted that the refund was not possible.

[11] We are of the view having accepted the documents submitted and made payments without reservations, the issuing bank is estopped from demanding the return of the payment made on the grounds of alleged defects or discrepancies. There must be certainty, promptness and finality of payment which a letter of credit serve to provide to the transacting parties. The court would also not lightly interfere with the bank's obligation to make payments under a letter of credit. On this point in *Hamzeh Malas & Sons v. British Imex Industries Ltd* [1958] 1 All ER 262, Jenkins LJ referred to the practice of the courts as follows:

> We were referred to several authorities, and it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

[12] It is further noted in this case there is no evidence that the respondent had in fact requested for the return of the documents. The alleged return of the documents at any rate in our view does not give an automatic right for the appellant to demand a refund or debit the respondent's account unilaterally. The appellant had requested the documents for rectification by the respondent and to have them resubmitted. Hence the alleged discrepancies, if any, had been resolved and therefore there is no basis for the return of the money.

A **Indemnity**

[13] A letter of indemnity was relied upon by the appellant to support the argument that the transaction was carried out under the UCP 400 which provides for a right of recourse. On this point
B we are in agreement with the finding of the Court of Appeal that the argument made by the appellant is unnecessary for if there is an indemnity, the appellant's recourse to the respondent is upon the indemnity and not the UCP 400.

[14] Even assuming the appellant can rely on the letter of
C indemnity it is our judgment that the indemnity was suspect as to its authenticity and applicability to the said letter of credit's transaction. The respondent had lodged a police report in which she admitted that she had given the documents relating to the letter of credit as well as a letter of indemnity to the appellant.
D However, the respondent contended that she only signed a blank general indemnity and maintained that it was for other purposes. The learned trial judge of the High Court accepted the evidence of the respondent and held that the letter of indemnity was suspicious because the date had been blanked over and it was
E executed for other purposes. That is a finding of fact made by the trial judge and it is trite that this court as an appellate court should not disturb such a finding unless the trial judge had made an error of law or made a finding contrary to the evidence before him.
F

Section 73 Of The Contracts Act 1950

[15] The appellant also relied on the provision of s. 73 of the Contracts Act 1950 to support its contention that the appellant
G as the negotiating bank was entitled to deduct the customer's account of the respondent for the purpose of returning the monies equivalent to the issuing bank's demand. Section 73 of the Contracts Act 1950 reads:

H > A person to whom the money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

[16] Section 73 of the Contracts Act 1950 applies both to mistake of fact as well as mistake of law. The Privy Council in the case of *Shiba Prasad Singh v. Chandra Nandi* [1949] LR 76 IA 244
I when construing payment by mistake under s. 72 of the Indian

Contracts Act which is in pari materia with our s. 73 stated that it must refer to a payment which was not due and which could not have been enforced. The mistake is in thinking that the money paid was due when in fact it was not due. In the Singapore case of *F.C. Seck Trading as Oversea Structural Company v. Wong And Lee* [1940] 1 LNS 19 it was held on appeal by the High Court that the court has the power to relieve against mistake of law as well as against mistake of fact if there is any equitable ground for doing so. Still, on the issue of payment by mistake in *Kelly v. Solari* (1835-1842) All ER Rep 320 Lord Abinger CB, *inter alia*, held:

> The safest rule, however, is that if the party makes the payment with full knowledge of facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again.

[17] Based on the principles of law as laid down in the above cited case authorities, it is our considered view for the present case that there was no payment by mistake to the respondent because the payment made was in fact due to the respondent under the letter of credit. There is no equitable ground to hold that the money has been paid by mistake. There was also no fraud on the part of the respondent during her receipt of the payment. The appellant had in fact represented to the respondent that the respondent was entitled to the payment. By doing so the appellant is estopped from seeking a refund. On this point we would refer to the case of *Holt & Ors. v. Markham* [1922] All ER 134 wherein Scrutton LJ at p. 141 held:

> I think this is a simple case of estoppel. In this case the plaintiffs have, in my view, represented to the defendant that he is entitled to a sum of money as a gratuity and have paid it, and after a lapse of time sufficient to enable mistake to be detected and rectified, the defendant has acted on the representation and has spent the money before any claim on him for return has been made.

Conclusion

[18] For the reasons abovestated we would answer the three questions posed in this appeal in the negative. In the result the appeal is dismissed with costs. We award a sum of RM25,000 as costs to the respondent. Deposit to the respondent towards costs.